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IN THE

Supreme Court of the United States

BRAZOS ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
and TENASKA IV TEXAS PARTNERS, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Edison Electric Institute adopts the questions presented in the Petition for Writ of *Certiorari* of Petitioner Brazos Electric Power Cooperative, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	2
SUMMARY OF ARGUMENT	3
BACKGROUND	4
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	7

TABLE OF AUTHORITIES

CASES: Page

American Paper Institute v. AEP Service Corp., 461 U.S. 402 (1983) 4
FERC v. Mississippi, 456 U.S. 742 (1982) 4

STATUTES:

16 U.S.C. §796(18) 4, 5
16 U.S.C. §824a 2
16 U.S.C. §2601 4
Public Utilaity Regulatory Policies Act of 1978, Pub. L. No. 95-617 (1978) 2

REGULATIONS:

18 C.F.R. §292.202(c) 5
18 C.F.R. §292.202(c)-(i) 5
18 C.F.R. §292.202(s) 5
18 C.F.R. §292.203(b) 5
18 C.F.R. §292.205 5

REGULATORY PROCEEDINGS:

Independent Power Producers of New York, 80 FERC ¶61,125 (1997) 5
PURPA Reform Group *Motion to Intervene, etc., Tenaska IV Partners, Ltd.*, FERC Docket No. EL97-56-000 (Oct. 3, 1997) 6

MISCELLANEOUS:

Utility Data Institute, *Measuring the Competition: Operating Cost Profiles for U.S. Investor-Owned Utilities 1995* (1996) 6

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Amicus curiae Edison Electric Institute (EEI) respectfully prays that the Court grant the petition of Brazos Electric Power Cooperative, Inc., for a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit in this matter. EEI has obtained consent from Petitioner and Respondents to file this brief. EEI has filed those consents with the Clerk of the Court concurrently with the filing of this brief.*

* This brief was authored in its entirety by the undersigned counsel of *amicus curiae*. No person or entity, other than the named *amicus curiae*, and counsel and members thereof, made any monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

EEI is the association of the United States investor-owned electric utilities, and their industry associates and affiliates world-wide. EEI's U.S. members serve about 90 percent of all customers served by the investor-owned segment of the industry. EEI members generate approximately 75 percent of the electricity used in the country, serving roughly 70 percent of ultimate customers. EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern, and has several times filed *amicus* briefs before this Court on matters closely related to those raised in this proceeding.

EEI members must comply with all applicable requirements of the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617 (1978). In particular, PURPA Section 210 requires utilities to purchase power from "qualifying facilities" (QFs). 16 U.S.C. §824a. EEI has a strong interest in assuring that its members are not forced to purchase power from entities which do not truly qualify for PURPA benefits, especially because one of the benefits available to QFs is a very favorable rate for such purchases by utilities. In fact, many utilities have been required to purchase power from QFs at rates far in excess of the cost of power from alternative sources.

EEI has a strong interest in this proceeding to address the important issue of assuring that determinations of QF status by the Federal Energy Regulatory Commission (FERC) are based on the reasoned consideration of all relevant information available to the Commission. FERC's decision in this case, as upheld by the Fifth Circuit Court of Appeals, runs directly counter to FERC's responsibility to enforce the restrictions Congress placed on the availability of PURPA benefits. In this case, FERC refused to acknowledge the obvious fact that the facility at issue was a sham designed to evade the statutory and regulatory requirements for QF status.

As the national association of investor-owned electric utilities, EEI is in a position to reflect the impact of the issues raised by this proceeding from a broader perspective than can Petitioner, which is not an investor-owned utility. This brief *amicus curiae* demonstrates that the questions arising in the instant case are substantial and have broad implications for all entities subject to federal regulation, as well as the nation's electric utilities, their customers, and the investors who provide the substantial capital necessary to maintain the reliability, safety, and effectiveness of the nation's electric utility systems.

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit in the proceeding below would allow any federal agency to remove or dramatically modify an explicit Congressional limitation merely by going through an absurd kind of definitional gymnastics exercise—the essence of sophistry in its worst sense. The Federal Energy Regulatory Commission (FERC)—just as any other Federal administrative agency—must not be permitted to avoid its responsibilities to rationally administer a statutory program by referring to only one purpose of that complex program. Congress could not have intended—and indeed did not intend—that cogeneration-based "qualifying facilities" (QFs) could obtain the highly favorable rate treatment available under the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617 (1978), despite extravagantly wasting thermal energy through literally throwing away the useful product of that thermal energy.

The specific result obtained by the ruling of the court below turns PURPA on its head and obtains a result that is exactly the kind of waste that PURPA was intended to alleviate. As a result, the economy will be burdened even more by an already dysfunctional program. The general result of the ruling is to permit the administrative branch to completely ignore the explicit intent, as well as the general will, of the legislative branch.

BACKGROUND

PURPA has been at issue before this Court several times, and we adopt Petitioner's factual statement herein, therefore this background will be brief. *See, e.g., American Paper Institute v. AEP Service Corp.*, 461 U.S. 402 (1983); *FERC v. Mississippi*, 456 U.S. 742 (1982). PURPA was passed in the late 1970s as a response to the so-called "energy crisis" of the early '70s. In essence, PURPA was intended to reduce unnecessary and inefficient uses of fossil fuels. This was to be done by encouraging the use of alternative fuels and encouraging greater efficiency in using fuels, including their use in the production of electricity. *See* 16 U.S.C. §2601.

The primary intent of PURPA was to reduce, or at least make more efficient, the use of fossil fuels. In order to accomplish that primary goal, PURPA created a class of electric generation facilities known as "qualifying facilities," or QFs, because they would qualify for special benefits by virtue of meeting certain requirements. Among those benefits were the right to require utilities to purchase their power at favorable rates (the "avoided cost" rate). The creation and promotion of QFs and QF generation was only a secondary goal—one of several means to a much more significant end.

Of those QFs, one sub-class was "cogeneration" QFs. 16 U.S.C. §796(18). Cogenerators were to take thermal energy that already was being, or would be, partially used in some industrial or commercial process, and the rest of which was being discarded, and were to use that otherwise discarded thermal energy to produce electricity. Congress's understanding—as FERC itself reflected—was that "useful thermal energy (such as heat or steam)" produced by consuming fossil fuel and hitherto only "used for industrial, commercial, heating, or cooling purposes," was instead generally powerful enough to be used for more than one purpose, such as "produc[ing] electric

energy . . . through the sequential use of [such thermal] energy." *See* 16 U.S.C. §796(18)(A)(ii); 18 C.F.R. §292.202(c).

REASONS FOR GRANTING THE PETITION

Congress did not explicitly define the term "useful thermal energy." Thus FERC has had to define the term. However, FERC was not left completely to its own devices in making such an interpretation. It is obvious from the explicit text of PURPA that Congress intended to refer to thermal energy actually used in some "industrial, commercial, heating, or cooling" process.

In other words, Congress clearly must have been referring to a thermal process which yielded something that was itself truly "useful" in the common sense of the word: *actually* used or usable by society, not just discarded immediately after production, even if that discarded waste could theoretically be considered *potentially* usable by someone at some time. Otherwise, there would have been no reason in the first place for Congress to have defined a category of *co*generation QFs, much less to have also imposed requirements regarding sequential use, operation, and efficiency. *See* 16 U.S.C. §796(18); 18 C.F.R. §§292.202(c)-(i), 292.202(s), 292.203(b), 292.205; *see also, Independent Power Producers of New York*, 80 FERC ¶61,125, *esp.* at p.61,398 (1997) (FERC affirms state program for "ensuring that the facilities that receive the economic and regulatory benefits accorded QFs under PURPA actually comply with the requirements for QF status as established by Congress and [the] Commission").

In fact, under the reasoning of FERC as upheld by the Fifth Circuit, all electric generation facilities that utilize steam to drive a turbine could claim to be "cogeneration" facilities, since one of their "thermal outputs" is steam no longer usable for generating power—*i.e.*, water in a form only slightly removed from that of the "distilled water" in this case. Moreover, when that waste steam is condensed back into water and reused as coolant and/or feedwater to make more steam (as is done in many

steam-turbine electric generation plants), there will be even less overall environmental waste than there is in this case, where the water was actually flushed down the sewers and not even used to help cool the generating equipment. A more foolish, self-defeating construction of a statutory requirement intended to promote efficiency and conservation cannot be imagined.

We must admit to some sympathy for the practicality of the argument that FERC should not be required to investigate the economics of every cogeneration QF. However, in this case FERC was presented with clear and unrebutable evidence of actual waste. We are not suggesting that FERC should require QF operators to prove their economic viability in advance. However, FERC certainly must not be allowed to overlook the painfully obvious evidence brought before it. To allow FERC to do so in this case is to condone any and every trick of logic by FERC and all other Federal agencies to evade any Congressional limitations on governmental benefits—limitations imposed precisely in order to ensure that Congress's actual intent is accomplished, rather than some distorted caricature thereof.

Finally, we note for the Court that the entire program of "avoided-cost" rates under PURPA has long been dysfunctional, and the result of the decision below will be to exacerbate an already egregious situation. The PURPA Reform Group (PRG) has estimated that this case alone will result in almost $900-million in excess electricity costs over the life of the contract. PRG *Motion to Intervene, etc., Tenaska IV Partners, Ltd.*, FERC Docket No. EL97-56-000 (Oct. 3, 1997). PURPA avoided-cost pricing overall has been estimated to be responsible for approximately $8-billion per year in unnecessarily high electricity prices. Utility Data Institute, *Measuring the Competition: Operating Cost Profiles for U.S. Investor-Owned Utilities 1995* (1996). (While the data may be slightly different by this time, power-purchase contracts under PURPA typically run for 20 or 30 years.) Thus, it is clear that this case just makes a very bad situation even worse.

Nonetheless, the primary problem evinced by this case is much more fundamental. Despite our disagreement with the wisdom of PURPA, or our long-standing opposition to the manner in which avoided-cost rates have been developed over the years, FERC's ruling, and the Fifth Circuit's holding below, should not be allowed to establish precedent for Federal agencies. The administrative branch must not be permitted to turn a statutory program completely on its head in order to produce a result so obviously contrary to the spirit and primary intent of the complex program which the legislative branch took great pains to create.

CONCLUSION

WHEREFORE, Edison Electric Institute prays that this Court grant Brazos Electric Power Cooperative's Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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